Lightcraft (KL) Sdn Bhd v Fortune Valley Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S 4–22–254 OF 1999
TENGKU MAIMUN JC
25 JUNE 2007

Contract — Privity of contract — Agreement with third party — Goods sold and delivered under a sub contract — Monies owing — Main contractor terminated — Surrounding circumstances and correspondence — Estoppel — Whether there was contract between third party plaintiff and defendant developer — Whether third party may claim under contract

The plaintiff's claim against the defendant is for the sum of RM314,805.50 being the monies due for the supply and delivery of light fittings and fixtures for a project known as Avillion Resort in Port Dickson ('the project'). The defendant is the developer of the project. The defendant appointed Seloga Jaya Sdn Bhd as the main contractor for the project. Lumino Design Sdn Bhd was appointed as the main contractor for the supply, delivery and installation of light fittings and fixtures. Upon acceptance by the defendant of the sub contract package by the plaintiff at RM700,000, vide a letter dated 22 January 1996 to A&A Rekarancang Sdn Bhd, the architect for the project, Seloga Jaya Sdn Bhd wrote to the plaintif by their letter dated 12 December 1996 awarding the sub-contract for the supply and delivery of light fittings and fixtures to the plaintiff at the cost of RM700,000. The plaintiff submitted a revised costing for the amount of RM844,432.51 by a letter dated 20 January 1997 to the defendant. Lumino Design Sdn Bhd vide a letter dated 6 March 1997 advised the defendant that the amount due to the plaintiff for progress claim No 1 was RM550,949.12. Seloga Jaya Sdn Bhd terminated its contract with the defendant and the plaintiff on 29 April 1997 and 2 May 1997 respectively. Thereupon the plaintiff carried on with the sub-contract works for the supply and delivery of the light fittings and fixtures for the project. On 2 July 1997 the plaintiff wrote to the defendant indemnifying the defendant against any sum paid to the plaintiff which was not legitimately owing to the plaintiff under the sub contract awarded by Seloga Jaya Sdn Bhd in return for the defendant paying the sum owing under the contract directly to the plaintiff as the employer and the plaintiff also confirmed receipt of RM365,000 paid by the defendant. On 17 June 1997, after the contract with Seloga Jaya Sdn Bhd was terminated, the defendant wrote a memo to the plaintiff directing the plaintiff to rectify the wiring works, failing which the defendant stated that they will engage a sub-contractor to carry out the works and that any cost incurred shall be defrayed from any monies due to the plaintiff. On 15 December 1997 Lumino Design wrote to the defendant certifying that the payment due to the plaintiff was RM280,815.22 and a further RM33,990.28 had been retained from the contract price, totaling RM314,805.50. The defendant resisted the plaintiff's claim on the grounds that the contract for the supply and delivery of light fittings and fixtures is between the plaintiff and Seloga Jaya Sdn Bhd

and the defendant is not a party to the contract. Therefore the plaintiff was to claim the monies for the value of work which it carried out from the main contractor, Seloga Jaya Sdn Bhd and not the defendant.

Held, entering judgment for the plaintiff for RM314,805.50 with interest and costs:

(1) The court found that the letter dated 2 July 1997 is very clear in its terms ie after the termination of the contract with Seloga Jaya, the plaintiff requested the defendant as the employer to make direct payments to the plaintiff for the works that had been carried out but which had not been paid by Seloga Jaya and that the obligation to indemnify the defendant would arise when the monies paid by the defendant is ultimately shown to be not legitimately due to the plaintiff. Therefore the argument of the learned counsel for the defendant that the payment of the RM365,000 was an advance from the defendant and that the plaintiff should refund the defendant that amount is unmeritorious given the clear meaning of the letter (see para 10).

(2) If the defendant had no intention to pay the plaintiff then there is no reason for the defendant to request Lumino Design Sdn Bhd to confirm the accounts of the plaintiff. Similarly there would be no reason for the defendant to inform the plaintiff that the accounts would be debited for the rectification works if the defendant is not settling the accounts of the plaintiff (see para 16).

(3) The defendant had not shown that the sum claimed by the plaintiff was not legitimately due to the plaintiff given the certification by Lumino Design Sdn Bhd on 15 December 1997 pursuant to the defendant's own request dated 29 October 1997 (see para 17).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah untuk jumlah RM314,805.50 iaitu wang yang perlu dibayar untuk membekal dan menghantar aksesori dan lekapan lampu untuk projek yang dikenali sebagai Avillion Resort di Port Dickson ('projek tersebut'). Defendan adalah pemaju projek tersebut. Defendan telah melantik Seloga Jaya Sdn Bhd sebagai kontraktor utama untuk projek tersebut. Lumino Design Sdn Bhd telah dilantik sebagai kontraktor utama untuk membekal, menghantar dan memasang aksesori dan lekapan lampu. Setelah penerimaan oleh defendan terhadap bungkusan sub kontrak oleh plaintif pada harga RM700,000 melalui sepucuk surat bertarikh 22 Januari 1996 kepada A&A Rekarancang Sdn Bhd, arkitek untuk projek tersebut, Seloga Jaya Sdn Bhd menulis kepada plaintif melalui surat mereka bertarikh 12 Disember 1996 mengawardkan sub kontrak untuk bekalan dan penghantaran aksesori dan lekapan lampu kepada pada kos RM700,000. Plaintif mengemukakan harga perubahan untuk jumlah RM844,432.51 melalui sepucuk surat bertarikh 20 Januari 1997 kepada defendan. Lumino Design Sdn Bhd melalui sepucuk surat bertarikh 6 Mac 1997 menasihati defendan bahawa jumlah yang perlu dibayar kepada plaintif untuk tuntutan kemajuan kerja No 1 adalah RM550,949.12. Seloga Jaya Sdn Bhd telah menamatkan kontraknya dengan defendan dan plaintif pada 29 April 1997 dan 2 Mei 1997 masing-masingnya. Plaintif meneruskan kerja-kerja sub kontrak untuk membekal dan menghantar aksesori dan lekapan

lampu untuk projek tersebut. Pada 2 Julai 1997 plainif telah menulis kepada defendan melindungi defendan daripada apa-apa jumlah yang dibayar kepada plaintif yang bukan secara sahnya terhutang kepada plaintif di bawah sub kontrak yang diawardkan oleh Seloga Jaya Sdn Bhd sebagai balasan defendan membayar jumlah terhutang di bawah kontrak secara langsung kepada plaintif sebagai majikan dan plaintif juga mengesahkan penerimaan RM365,000 yang dibayar oleh defendan. Pada 17 Jun 1997, selepas kontrak dengan Seloga Jaya Sdn Bhd ditamatkan, defendan telah menulis memo kepada plaintif mengarahkan plaintif membetulkan kerja-kerja pemasangan wayar, dan sekiranya gagal, defendan menyatakan bahawa mereka akan melantik sub kontraktor untuk melaksanakan kerja-kerja tersebut dan bahawa apa-apa kos yang dikenakan hendaklah dibayar daripada wang yang patut dibayar kepada plaintif. Pada 15 Disember 1997 Lumino Design telah menulis kepada defendan mengesahkan bahawa bayaran yang patut dibayar kepada plaintif adalah RM280,815.22 dan sebanyak RM33,990.28 lagi telah dikekalkan berdasarkan harga kontrak, yang mana keseluruhannya berjumlah RM314,805.50. Defendan menentang tuntutan plaintif atas alasan bahawa kontrak untuk bekalan dan penghantaran aksesori dan lekapan lampu adalah antara plaintif dan Seloga Jaya Sdn Bhd dan defendan bukan pihak kepada kontrak. Oleh itu plaintif patut menuntut wang untuk nilai kerja yang dijalankan daripada kontraktor utama, Seloga Jaya Sdn Bhd dan bukan defendan.

Diputuskan, memasukkan penghakiman bagi pihak plaintif unutk RM314,805.50 dengan faedah dan kos:

(1) Mahkamah mendapati bahawa surat bertarikh 2 Julai 1997 jelas dalam terma-termanya, iaitu selepas penamatan kontrak dengan Seloga Jaya, plaintif memohon defendan sebagai majikan untuk membuat bayaran langsung kepada plaintif untuk kerja-kerja yang telah dijalankan tetapi yang belum dibayar oleh Seloga Jaya dan bahawa obligasi untuk melindungi defendan akan timbul apabila wang yang dibayar oleh defendan telah dibuktikan secara tidak sah patut dibayar kepada plaintif. Oleh itu hujah peguam bijaksana bagi pihak defendan bahawa bayaran RM365,000 merupakan pendahuluan daripada defendan dan bahawa plaintif patut mengembalikan defendan jumlah tersebut tidak bermerit berdasarkan maksud jelas surat tersebut (lihat perenggan 10).

(2) Jika defendan tiada niat untuk membayar plaintif maka tiada alasan untuk defendan meminta Lumino Design Sdn Bhd mengesahkan akaun plaintif. Begitu juga tiada alasan untuk defendan memaklumkan plaintif bahawa akaun tersebut akan didebitkan untuk kerja-kerja pembaikan jika defendan tidak menyelesaikan akaun plaintif (lihat perenggan 16).

(3) Defendan tidak menunjukkan bahawa jumlah yang dituntut oleh plaintif secara tidak sah patut dibayar kepada plaintif berdasarkan perakuan Lumino Design Sdn Bhd pada 15 Disember 1997 menurut permintaan defendan sendiri bertarikh 29 Oktober 1997 (lihat perenggan 17).]

Notes

For a case on agreement with third party, see 3(1) *Mallal's Digest* (4th Reissue, 2006 Reissue) para 4615.

Cases referred to

Chooi Siew Cheong v Lucky Height Development Sdn Bhd [1995] 1 MLJ 513 (refd)

Jagjit Kaur (Nazri Aziz & Wong) for plaintiff.
Sanjay Mohanansundram (Lee Hishammuddin Allen & Gledhill) for the defendant.

Tengku Maimun JC:

[1] On 24 January 2007 when this matter came up for trial, both learned counsel for the plaintiff and the defendant agreed that witnesses be dispensed with and parties proceeded by filing written submission on the issue of liability based on the documents in Part A and B of the common bundle of documents ('CBD') which existence and contents have been agreed upon.

[2] The plaintiff's claim against the defendant is for the sum of RM314,805.50 being the monies due for the supply and delivery of light fittings and fixtures for a project known as Avillion Resort in Port Dickson ('the project'). The defendant is the developer for the project and it had appointed Seloga Jaya Sdn Bhd as the main contractor for the project. Lumino Design Sdn Bhd is the main contractor for the supply, delivery and installation of light fittings and fixtures. On 22 January 1996 the defendant wrote to A& A Rekarancang Sdn Bhd, the architect for the project stating, 'We are pleased to advise on our acceptance of Messrs Lightcraft (KL) Sdn Bhd offer for the abovementioned sub-contract package at RM700,000.'. This was followed by a letter dated 12 February 1996 from Seloga Jaya Sdn Bhd to the plaintiff awarding the sub-contract for the supply and delivery of light fittings and fixtures to the plaintiff at the cost of RM700,000. By a letter dated 20 January 1997 to the defendant, the plaintiff submitted a revised costing for the amount of RM844,432.51. Lumino Design Sdn Bhd vide a letter dated 6 March 1997 advised the defendant that the amount due to the plaintiff for progress claim No 1 was RM550,949.12.

[3] Seloga Jaya Sdn Bhd terminated its contract with the defendant and the plaintiff on 29 April 1997 and 2 May 1997 respectively. Thereupon the plaintiff carried on with the sub-contract works for the supply and delivery of the light fittings and fixtures for the project.

[4] On 2 July 1997 the plaintiff wrote to the defendant as follows:

> We are the Nominated Subcontractor ('NSC') to Seloga Jaya Sdn Bhd the main contractor, for the supply, installation of light fitting for the construction of the abovementioned project.
>
> Messrs Seloga Jaya Sdn Bhd as the main contractor has declared his intention to terminate the main contract, as such we have requested Messrs Fortune Valley Sdn Bhd for direct payment from Messrs Fortune Valley Sdn Bhd as Employer.
>
> In consideration of Messrs Fortune Valley Sdn Bhd making direct payment to us, we hereby irrevocably undertake to Messrs Fortune Valley Sdn Bhd that we shall repay to Messrs Fortune Valley Sdn Bhd for all monies paid directly to us by Messrs Fortune Valley Sdn Bhd

in respect of payments due to us as NSC to Messrs Seloga Jaya Sdn Bhd in the event that the payments are not being legitimately due to us from Messrs Seloga Jaya Sdn Bhd. We undertake to make payment to you immediately upon your demand and in the event that we fail to repay you, such monies shall be treated as a debit due from us to you without the need for further proof or substantiation from you.

We hereby confirm our receipt of RM365,000 … from Messrs Fortune Valley Sdn Bhd 2 July 1997.

[5] On 22 May 1997 the defendant issued a Payment Certificate No 1 which states the amount due to the plaintiff as RM365,000 and the payment certificate also bears the following words: 'I /We hereby certified payment of the sum stated above for the Supply, Delivery and Installation of Light Fittings' (pg 59 CBD). On 6 June 1997 the plaintiff wrote to the defendant stating that 'We are agreeable to the certificate payment of RM365,000 for our first payment' (pg 6 CBD).

[6] On 15 December 1997 Lumino Design wrote to the defendant which reads:

Referred to the claim submitted by Lightcraft (KL) Sdn Bhd dated 20th October 1997, we are pleased to certify the following payment for your further action.

Revised contract sum: RM815,725.50

Less VO — Bedside and desk

table lamp

Pangkin table lamp RM135,920

Total amount certified up to date RM679,805.50

Less 5% retention RM 33,990.28

RM645,815.22

Less amount received till date RM365,000

Amount due for this final claim RM280,815.22

(p 67 CBD)

[7] The amount claimed by the plaintiff is for RM280,815.22 + RM33,990.28 which amounts to RM314,805.50.

[8] The learned counsel for the defendant in his written submission argued that the contract for the supply and delivery of light fittings and fixtures is between the plaintiff and Seloga Jaya Sdn Bhd and the defendant is not a party to the contract. Although it was not disputed that the plaintiff had carried out certain works in accordance with the contract, learned counsel for the defendant submitted that there can also be no dispute that the plaintiff has to claim the monies for the value of work which it carried out from the main contractor, Seloga Jaya Sdn Bhd and not the defendant.

[9] Learned counsel further argued that the payment of RM365,000 by the defendant on the terms of the letter dated 2 July 2997 (p 8 CBD) was only an

advance and the letter doesn't constitute a contract. Neither is there any obligation on the defendant to pay the plaintiff any monies over and above the RM365,000. Learned counsel further argued that in fact, by the terms of the letter the plaintiff agreed to repay the defendant the sum of RM365,000.

[10] I find that the letter dated 2 July 1997 is very clear in its terms ie after the termination of the contract with Seloga Jaya, the plaintiff requested the defendant as the employer to make direct payments to the plaintiff for the works that had been carried out but which had not been paid by Seloga Jaya and that the obligation to indemnify the defendant will arise when the monies paid by the defendant is ultimately shown to be not legitimately due to the plaintiff. Therefore the argument of the learned counsel for the defendant that the payment of the RM365,000 was an advance from the defendant and that the plaintiff should refund the defendant that amount is unmeritorious given the clear meaning of the letter.

[11] Learned counsel for the defendant had also argued that the single letter of 2 July 1997 cannot form the basis of the contract between the plaintiff and the defendant. Indeed I agree with learned counsel, except that in the instant case the court is looking not just at the letter but the surrounding circumstances in coming to the conclusion that there was a contract between the parties. In doing so I am guided by the words of Chong Siew Fai FCJ (as he then was) in *Chooi Siew Cheong v Lucky Height Development Sdn Bhd* [1995] 1 MLJ 513 at p 522:

> We were of the view that in the construction of an agreement, it would not be right to look at one clause in isolation. All the other relevant clauses in the joint venture agreement and in the trilateral agreement must also be considered in the context of the whole of the transaction. *Regard must also be had to any surrounding circumstances, if any, which might legitimately be taken into consideration.*
>
> (Emphasis added.)

[12] Although it was contended that the defendant had nothing to do with the contract which was entered into between the plaintiff and Seloga Jaya Sdn Bhd, the surrounding circumstances show otherwise. On 17 June 1997 ie after the contract with Seloga Jaya Sdn Bhd was terminated, the defendant wrote a memo to the plaintiff directing the plaintiff to rectify the wiring works, failing which the defendant states that they will engage a sub-contractor to carry out the works and that any cost incurred shall be defrayed from any monies due to the plaintiff (p 174 CBD).

[13] On 25 September 1997 the defendant wrote to Lumino Design (M) Sdn Bhd stating that 'Your evaluation and confirmation of final account on total lighting work and dimmer installation is still awaited. Please kindly have them finalise not later than date 31 October 1997.' This letter was copied to the plaintiff (p 181 CBD). On 29 October 1997 the defendant wrote to Lumino Design and the letter states inter alia:

> Lightcraft (KL) Sdn Bhd latest claim submission dated 20 October 1997 refers.

As previously discussed, please kindly evalue (*sic*) and advise soonest possible on the following: A

a) Final account;

b) Uncompleted work as per previous comments.

… Please do make all recommendation directly to Fortune Valley Sdn Bhd and only copy to Lightcraft (KL) Sdn Bhd … (p 182 CBD). B

[14] On 18 November 1997 the defendant wrote to the plaintiff in the following terms:

We have been advised by the operator that the compound lighting frequently trips when rained. C

You are hereby instructed to rectify the above defect and if so required to replace all faulty junction boxes, connections and fittings not later than 25 November 1997, failing which we shall engage others to rectify the same on your behalf and debit your account accordingly. (p 183 CBD). D

[15] All these letters pointed to only one conclusion, ie that the defendant has wanted to make payments to the plaintiff directly which is consistent with the letter dated 2 July 1997. In my view the defendant is now estopped from saying that they are not liable to pay the plaintiff when the defendant has represented that payments will be made to the plaintiff. E

[16] If the defendant had no intention to pay the plaintiff then there is no reason for the defendant to request Lumino Design Sdn Bhd to confirm the accounts of the plaintiff. Similarly there would be no reason for the defendant to inform the plaintiff that the accounts will be debited for the rectification works if the defendant is not settling the accounts of the plaintiff. F

[17] The defendant has not shown that the sum claimed by the plaintiff is not legitimately due to the plaintiff given the certification by Lumino Design Sdn Bhd on 15. December 1997 pursuant to the defendant's own request dated 29 October 1997. G

[18] In the light of the defendant's request and Lumino Design's certification of the plaintiff's claim and in the absence of any other evidence to the contrary, it is my view that the defendant's liability has been established. Judgment is therefore entered for the plaintiff for RM314,805.50 with interest and costs as prayed. H

Judgment entered for the plaintiff for RM314,805.50 with interest and costs.

Reported by Navit Kaur Randhawa I